DOCUMENT RESUME

ED 359 636 EA 025 072

AUTHOR	Ackerman, David M.
TITLE	Choice Programs and State Constitutions: The Inclusion of Sectarian Schools. CRS Report for Congress.
INSTITUTION	Library of Congress, Washington, D.C. Congressional Research Service.
REPORT NO	CRS-92-260-A
PUB DATE	2 Mar 92
NOTE	25p.
PUB TYPE	Reports - Descriptive (141)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Compliance (Legal); Constitutional Law; Elementary Secondary Education; *Federal Aid; *Private Education; Private Schools; *School Choice; State Action; *State Aid; *State Legislation

ABSTRACT

This report addresses the issue of the extent to which state constitutions permit sectarian schools to be included in a choice program. The issue has arisen in connection with federal proposals to fund school-choice programs subject to the law of each state. If the question is considered without reference to federal funding, the inclusion of sectarian schools in choice programs would seem to be clearly permissible in 12 states, explicitly prohibited in 1, and constitutionally dubious in 6. However, if considered with reference to federal funding, it is uncertain whether any states other than Missouri and Virginia would prohibit sectarian schools from participating in a choice program. This report sets forth the pertinent constitutional provisions and interpretations of the 38 states that have provisions of the types described and draws such general conclusions as the present state of the law permits. (LMI)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

CRS Report for Congress

ED359636

Choice Programs and State Constitutions: The Inclusion of Sectarian Schools

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
✓ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

David M. Ackerman
Legislative Attorney
American Law Division

March 2, 1992

EA 025 072

Congressional Research Service • The Library of Congress

BEST COPY AVAILABLE

The Congressional Research Service works exclusively for the Congress, conducting research, analyzing legislation, and providing information at the request of committees, Members, and their staffs.

The Service makes such research available, without partisan bias, in many forms including studies, reports, compilations, digests, and background briefings. Upon request CRS assists committees in analyzing legislative proposals and issues, and in assessing the possible effects of these proposals and their alternatives. The Service's senior specialists and subject analysts are also available for personal consultations in their respective fields of expertise.

CHOICE PROGRAMS AND STATE CONSTITUTIONS: THE INCLUSION OF SECTARIAN SCHOOLS

SUMMARY

This report addresses the issue of the extent to which State constitutions permit sectarian schools to be included in a choice program. The issue has arisen in connection with Federal proposals to fund school choice programs subject to the law of each State.

State constitutional provisions that appear most pertinent to this issue are those which prohibit a State from appropriating money or property to aid or support a religious sect or for a religious purpose, to aid a sectarian school, or to aid a private school regardless of whether it is sectarian or not. The constitutions of thirty-eight States have such provisions, but analysis of these provisions makes clear only that generalization about their effect is very uncertain.

If the question is considered without reference to Federal funding, the inclusion of sectarian schools would seem to be permissible in the twelve States that do not have State constitutional provisions of the types described--Arkansas, Connecticut, Iowa, Louisiana, Maine, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee, Vermont, and West Virginia. Sectarian schools might also be included, although the matter is less certain, in those States that have construed their constitutions, without contrary construction, either to permit some sort of voucher system--New Mexico--or to allow such indirect assistance to sectarian schools as bus transportation and textbook loan programs for sectarian schoolchildren--Indiana, Kentucky, Minnesota, Mississippi, New Hampshire, Ohio, and Pennsylvania. At the other end of the spectrum sectarian schools would seem to be explicitly prohibited from participating in a choice program in Michigan and implicitly in the six other States that bar indirect as well as direct assistance to sectarian schools--Florida, Georgia, Missouri, Montana, New York, and Oklahoma. Their participation might also be doubtful in those States that have construed their constitutions to forbid some variant of a tuition assistance program and/or such indirect assistance programs as bus transportation or textbook loan programs for sectarian schoolchildren--Alabama, Alaska, Georgia, Hawaii, Idaho, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Virginia, and Washington.

But if the question is considered with reference to choice programs that are Federally funded, sectarian schools would seem to be prohibited from participating only in Missouri and, perhaps, Virginia. The reason is that a number of States have construed their constitutional provisions not to apply to Federally funded programs. Eight States have explicitly so held, and that might be the case in the other States as well, except for Missouri and, perhaps, Virginia.

This report sets forth the pertinent constitutional provisions and interpretations of the thirty-eight States that have provisions of the types described and draws such general conclusions as the present state of the law permits.

TABLE OF CONTENTS

INTRODUCTION 1
SUMMARY ANALYSIS 1
PROVISIONS OF THE INDIVIDUAL STATES 4
- ALABAMA 4
- ALASKA 4
- ARIZONA 5
- CALIFORNIA 5
- COLORADO 6
- DELAWARE 7
- FLORIDA 7
- GEORGIA 7
- HAWAII 7
- IDAHO 8
- ILLINOIS 8
- INDIANA 9
- KANSAS 9
- KENTUCKY 9
- MASSACHUSETTS 9
- MICHIGAN 10
- MINNESOTA 11
- MISSISSIPPI 11
- MISSOURI 12
- MONTANA 12
- NEBRASKA 13
- NEVADA 13
- NEW HAMPSHIRE 13
- NEW MEXICO 14
- NEW YORK 14
- NORTH DAKOTA 14
- OHIO 15
- OKLAHOMA 15
- OREGON 16
- PENNSYLVANIA 16
- SOUTH CAROLINA 16
- SOUTH DAKOTA 16
- TEXAS 17
- UTAH 17
- VIRGINIA 18
- WASHINGTON 19
- WISCONSIN 19
- WYOMING 20

CHOICE PROGRAMS AND STATE CONSTITUTIONS: THE INCLUSION OF SECTARIAN SCHOOLS

INTRODUCTION

One issue that has arisen in the ongoing debate about school choice programs concerns the extent to which State constitutions might prohibit such programs from including sectarian schools. One provision of H.R. 3320 as reported by the House Education and Labor Committee, for instance,[1] would have permitted local educational agencies to use grants under the bill for, *inter alia*, "choice programs consistent with State law and State constitutions which permit parents to select the school their children will attend."[2] This report addresses the issue of the extent to which State constitutions would permit sectarian schools to be included in a choice program.

SUMMARY ANALYSIS

Pertinent church-State provisions in State constitutions fall into six general categories,[3] as follows: (1) provisions that simply replicate the language of the establishment clause of the First Amendment; (2) provisions that state that no person shall be compelled to support any ministry without his or her consent; (3) provisions that prohibit religious preference or discrimination; (4) provisions that prohibit the State from appropriating money or property to aid or support a religious sect or for a religious purpose; (5) provisions that prohibit the State from appropriating money or property to a religious school; and (6) provisions that prohibit the State from aiding or supporting any private school, whether sectarian or secular. The first three categories of provisions have generally not been construed differently than the establishment clause of the First Amendment[4] and thus, unless State courts begin to construe them differently, would not seem to pose an obstacle to a properly designed choice program that included sectarian schools. But the more specific provisions of the

---

[1] H.R. 3320, 102d Cong., 1st Sess. (1991); H. Rept. No. 102-294 (Nov. 7, 1991).

[2] *Id.*, § 8009(4).

[3] This categorization is based upon, but modifies slightly, that set forth in "Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions," 71 *Virginia Law Review* 625-653 (1985).

[4] *Id.*, at 632.

latter three categories on their face seem to require a sharper separation of church and State than the establishment clause and could have implications for a choice program.

Nonetheless, an examination of the provisions in the latter three categories makes clear only that generalization about their effect on a choice program is uncertain at best. Thirty-eight States have one or more of the provisions in the last three categories. In one State--Michigan--the provisions explicitly bar tuition vouchers. In six States--Florida, Georgia, Missouri, Montana, New York, and Oklahoma--the provisions, without mentioning tuition vouchers, explicitly prohibit indirect as well as direct assistance to sectarian schools. In six additional States--Alabama, Alaska, South Carolina, Texas, Virginia, and Washington--the provisions have been construed, without conflicting interpretations, to bar some variant of a tuition grant or voucher system. In another six States--Georgia, Hawaii, Idaho, Nebraska, Oklahoma, and South Dakota--the provisions have been construed to bar either or both bus transportation for sectarian school students and/or the loan of textbooks to such students--the kinds of indirect assistance that have been upheld under the establishment of religion clause of the First Amendment and that have foreshadowed constructions upholding tuition grant and tax programs benefiting sectarian schools.[5]

On the other hand, in one State--New Mexico--an Attorney General's opinion has explicitly construed the pertinent provisions to allow some variant of a voucher system. In seven States--Indiana, Kentucky, Minnesota, Mississippi, New Hampshire, Ohio, and Pennsylvania--the provisions have been interpreted, without conflicting constructions, to permit either a bus transportation program or textbook loan program for sectarian schoolchildren, or both. However, in four States--Arizona, California, Illinois, and Massachusetts--the provisions have received possibly conflicting constructions, having been interpreted to permit a bus transportation program but to prohibit either a textbook loan program or a particular tuition voucher program or both.

Notwithstanding these observations, it is not certain except in one and, perhaps, two of these States that a **Federally-funded** choice program that

---

[5] *Everson v. Board of Education*, 330 U.S. 1 (1947) (bus transportation upheld) and *Board of Education v. Allen*, 392 U.S. 236 (1968) (textbook loan program). These decisions were predicated on what is generally known as the "child benefit" theory, *i.e.*, that they were constitutional because their benefit was primarily to the sectarian school child and not to the school itself. This theory, although not explicitly relied upon, clearly lay in the background of the Supreme Court's subsequent decisions upholding certain forms of tax benefit and tuition grant programs to sectarian school students and their parents. *See, Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions for educational expenses incurred by parents of both public and private schoolchildren upheld) and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation grant to blind student for use in training for a religious vocation at a Bible college upheld).

included sectarian schools would be prohibited. In eight States--Colorado, Georgia, Massachusetts, Michigan, Montana, Nebraska, Nevada, and New Mexico--the pertinent constitutional provisions either explicitly or by construction do not apply to Federal funds received by the State. Thus, in those States it appears clear that a Federally funded choice program that included sectarian schools could be implemented. At the other end of the spectrum, only Missouri and Wisconsin have by formal decision held their State constitutional restrictions to apply to Federal funds, although Virginia reportedly has done so as well under the Chapter I program of the Elementary and Secondary Education Act.[6] Missouri has a particularly strict history of church-State separation, and thus it seems likely that the inclusion of sectarian schools in a Federally funded choice program would be unconstitutional under the provisions of its laws. That may be the case with respect to Virginia as well, as its provisions have been construed to bar tuition assistance to students attending sectarian schools and it has invoked the bypass provision of Chapter I. But the Virginia courts reached that decision without ruling on the child benefit theory as such and thus that conclusion is not entirely certain. It is also not certain with respect to Wisconsin or with respect to the remaining twenty-seven States that have not opined on whether Federal funds are subject to their State constitutions.

In sum, the effect of State constitutions on a Federally funded choice program appears to be very problematic. If the question is considered without reference to Federal funding, the inclusion of sectarian schools in choice programs would seem to be clearly permissible in the twelve States that do not have State constitutional provisions falling within the last three categories noted above--Arkansas, Connecticut, Iowa, Louisiana, Maine, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee, Vermont, and West Virginia. With less certainty, it also appears that sectarian schools might be included in choice programs in those States that have construed their constitutions, without contrary constructions, either to permit some sort of voucher system--New Mexico--or to allow such indirect assistance programs as bus transportation or textbook loans--Indiana, Kentucky, Minnesota, Mississippi, New Hampshire, Ohio, and Pennsylvania. At the other end of the spectrum the inclusion of sectarian schools would seem to be explicitly prohibited in Michigan and to be constitutionally dubious in the six other States that bar indirect as well as direct assistance--Florida, Georgia, Missouri, Montana, New York, and Oklahoma. Their inclusion might also be doubtful in those States that have construed their constitutions to prohibit either some variant of a voucher program or such indirect assistance programs as bus transportation or textbook loans--Alabama, Alaska, Georgia, Hawaii, Idaho, Nebraska, Oklahoma, South Carolina, South

---

[6] Chapter I requires that educationally deprived children in private elementary and secondary schools be served by the remedial and enrichment programs it authorizes and includes a bypass provision to permit such services to be offered if a local educational agency is constitutionally unable to provide such services itself. *See* 20 U.S.C. 2727(b) (1988). Reportedly, only Missouri and Virginia have required that the bypass provision be invoked.

Dakota, Texas, Virginia, and Washington. Where the remaining States fall on the spectrum is too uncertain to speculate.

But if the question is considered with reference to Federal funding, then it is uncertain whether in any State but Missouri and, perhaps, Virginia, sectarian schools would be prohibited from joining in a choice program. Their participation might be barred in other States, but the present state of the law simply does not permit firm conclusions to be drawn on the matter.

PROVISIONS OF THE INDIVIDUAL STATES

The following list details the State constitutional provisions that would seem to have the greatest import for the inclusion of sectarian schools in a choice program. The list includes only those States that have in their constitutions one or more of the provisions described in the last three categories above, *i.e.*, provisions that prohibit the appropriation of money for a religious sect or a religious purpose, for a religious school, or for a private school. It does not include, in other words, those States whose constitutions include provisions described in the first three categories above, *i.e.*, provisions that replicate, or are generally construed to have the same effect as, the First Amendment and that seem to pose no barrier to properly designed choice programs.[7] The "Comments" column in the following listing includes judicial and administrative interpretations of the cited provisions that would seem to have some implications for a choice program and notes where those interpretations appear to be dispositive of the issue:

State	Pertinent Constitutional Provision(s)	Comments
ALABAMA	"No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school." Article XIV, § 263.	State Supreme Court has opined that this provision would be violated by a program of tuition grants to students attending private colleges in the State, some of which would be sectarian. *Opinion of the Justices*, 291 Ala. 301, 280 So.2d 547 (1971).
ALASKA	"No money shall be paid from public funds for the direct benefit of any religious or	Although the proscription is limited to "direct benefits," it has been construed by the

[7] To repeat, those States are Arkansas, Connecticut, Iowa, Louisiana, Maine, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee, Vermont, and West Virginia.

	other private educational institution." Article VII, § 1.	Alaska Supreme Court to prohibit both the public subsidy of the transportation of school children to nonpublic schools and a tuition grant program to students attending private colleges in the State. *See Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), *cert. den.*, 368 U.S. 517 (1962) and *Sheldon Jackson College v. State*, 599 P.2d 127 (Alaska 1979), respectively.
ARIZONA	"No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Article 2, § 12. "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." Article 9, § 10.	The State Attorney General has opined that these provisions would not be violated by a program allowing an income tax deduction to the parents of public and private schoolchildren for the costs of tuition, transportation, and secular textbooks or by a program providing bus transportation to parochial schoolchildren but would be violated by a program that paid tuition to a private parochial school. *See* Op.Atty.Gen. No. I83-140, Op.Atty.Gen. No. I82-013, and Op.Atty.Gen. No. I81-049, respectively.
CALIFOR-NIA	"Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination	State courts have construed these provisions not to prohibit the transportation of sectarian schoolchildren on public school buses but to prohibit a program loaning secular textbooks to them, and State Attorney General has opined that secular private schools could be eligible for voucher funding but pervasively sectarian schools could not under these provisions. *See Bowker v. Baker*, 73 Cal.App.2d 653, 167

	whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI." Article 16, § 5. "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools...." Article 9, § 8.	P.2d 256 (1946); *California Teachers Assn. v. Riles*, 29 Cal.3d 794, 176 Cal.Rptr. 300, 632 P.2d 953 (1981); and 64 Ops.Atty.Gen. 61 (2-5-81).
COLORADO	"No appropriations shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." Article V, § 34. "Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian	State Supreme Court has construed Article V, § 34, to apply only to State funds and as not invalidating a tuition grant program available to needy students at private colleges that were not pervasively sectarian. *See In re House*, 23 Colo. 87, 46 P. 117 (1896) and *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072 (Colo. 1982).

	denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose." Article IX, § 7.	
DELAWARE	"No portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school...." Article X, § 3.	State Supreme Court has construed this section to prohibit the public provision of bus transportation to students attending sectarian schools. *Opinion of the Justices*, 59 Del. 181, 216 A.2d 668 (1966). (Subsequently, the State Constitution was amended to permit such transportation. *See* Article X, § 5.)
FLORIDA	"....No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." Article 1, § 3.	
GEORGIA	"No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution." Article 1, § 2, ¶ 7.	State Attorney General has construed this provision to be stronger than the First Amendment, to prohibit the public subsidy of transportation for students attending private schools, and **not** to proscribe the State's participation in an exclusively Federally funded program providing resources to private as well as public schools. *See* 1960-61 Op. Att'y Gen. 349, 1945-47 Op. Att'y Gen. 222, and 1965-66 Op. Att'y Gen. No. 65-4, respectively.

HAWAII	"...nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution." Article X, § 1.	State Supreme Court has construed this provision to prohibit the public subsidy of bus transportation for private school students and to reject the child benefit theory sometimes used in First Amendment jurisprudence to uphold aid to sectarian school students or parents. *Spears v. Honda*, 51 Haw. 1, 449 P.2d 130 (1968).
IDAHO	"Neither the legislature nor any county, city, town, township, school district, or other public corporation shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose...." Article 9, § 5.	State Supreme Court has construed this provision to prohibit the public subsidy of bus transportation for sectarian schoolchildren. *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), *cert. den.*, 406 U.S. 957 (1972).
ILLINOIS	Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university,	State courts have construed this provision to prohibit a State program giving low-income parents of children attending private schools grants equal to the amount the State spent on public school students but to allow public bus transportation of private schoolchildren. *See People ex rel. Klinger v.*

	or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose." Article 10, § 3.	*Howlett*, 56 I..2d 1, 305 N.E.2d 129 (1973) and *Board of Education, School District No. 142, Cook County v. Bakalis*, 54 I..App. 448, 299 N.E.2d 737 (1973).
INDIANA	"No money shall be drawn from the treasury, for the benefit of any religious or theological institution." Article 1, § 6.	State Attorney General has construed this provision **not** to prohibit the provision of bus transportation to parochial schoolchildren. 1967, No. 3, at 9.
KANSAS	"...No religious sect or sects shall control any part of the public educational funds." Article 6, § 6(c).	
KENTUCKY	"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." Section 189.	State Supreme Court has construed this provision to prohibit public bus transportation of private school students and the provision of textbooks in nonpublic schools. *See Sherrard v. Jefferson*, 294 Ky. 469, 171 S.W.2d 963 (1942) and *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), respectively.
MASSACHU-SETTS	"No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not	State Supreme Judicial Court has construed this provision to prohibit program reimbursing parents of private schoolchildren for part of their educational expenses. *Opinion of the Justices*, 357 Mass. 846, 259 N.W.2d 564 (1970). State Attorney General has construed it to prohibit a State tuition grant program, to permit public bus

	publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both...; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions." Amended Article XVIII.	transportation of private school students, and to have **no** applicability to programs financed exclusively with Federal funds. *See* 6 Op.Atty.Gen. 1922 at 648; Op.Atty.Gen. June 15, 1976, at 183; and Op.Atty.Gen. July 11, 1966, at 37, respectively.
MICHIGAN	"...No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose...." Article 1, § 4. No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be	State Supreme Court has construed second provision as allowing aid that is not primary but only incidental to a private school's operation and as having **no** application to Federal funds. *See In re Advisory Opinion re Constitutionality of 1974 P.A. 242*, 394 Mich. 41, 228 N.W.2d 772 (1975) and *In re Proposal C.*, 384 Mich. 390, 185 N.W.2d 9 (1971), respectively. State Attorney General has construed second provision to prohibit a tax benefit or tuition grant program for the parents of private schoolchildren. Op.Atty.Gen. 1970, No. 4715, at 183.

	provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school. Article 8, § 2.	
MINNESOTA	"...[N]or shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries." Article 1, § 16. "In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." Article 13, § 2.	State Supreme Court has construed these provisions to permit the public subsidy of bus transportation for parochial school students. *Americans United, Inc. v. Independent School District*, 288 Minn. 196, 179 N.W.2d 146, *appeal dism'd*, 403 U.S. 945 (1970).
MISSISSIPPI	"No law granting a donation or gratuity in favor of any person or object shall be enacted except by the concurrence of two-thirds of the members elect of each branch of the legislature, nor by any vote for a sectarian purpose or use." Article 4, § 66. "No religious or other sect or sects shall ever control any part of the school or other educational funds of this state, nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at	State Supreme Court has construed first provision to apply only to gifts and not to appropriations for a public purpose, and second provision to permit the subsidy of secular textbooks used by students attending private or sectarian schools. *See Craig v. Mercy Hospital-Street Memorial*, 45 So.2d 809 (Miss.), *sugg. of error overr*, 209 M 490, 47 So.2d 867, and *Chance v. Mississippi State Textbook Rating and Purchasing Bd.*, 190 M 453, 200 So. 706.

	the time of receiving such application is not conducted as a free school." Article 8, § 208.	
MISSOURI	"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such...." Article 1, § 7. Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever." Article 9, § 8.	State Supreme Court has construed these provisions to mandate a higher degree of separation of church and state than that afforded by the First Amendment and to prohibit textbook loan and bus transportation programs, and State Attorney General has construed them to apply to Federal grants to the State. *See Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976), *cert. den.*, 421 U.S. 992 (1977); *Mallory v. Barrera*, 544 S.W.2d 556 (Mo. 1976); Op.Atty.Gen. No. 31, Calloway (1-10-79); and Op.Atty.Gen. No. 102, Mallory (5-16-77).
MONTANA	"(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary,	

	college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education." Article X, § 6.	
NEBRASKA	"Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof....The state shall not accept money or property to be used for sectarian purposes; *Provided*, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto." Article VII, § 11.	State Supreme Court has construed this provision to bar a program loaning textbooks to students in private schools. *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974).
NEVADA	"No public funds of any kind or character whatever, State, County, Municipal, shall be used for sectarian purpose." Article 11, § 10.	State Attorney General has construed this provision not to apply to Federal funds, so long as they are kept separate. AGO 276 (11-5-1965).
NEW HAMPSHIRE	"...*Provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." Part 2, Article 83.	State Supreme Court has construed this provision to prohibit only aid that provides "more than incidental and indirect benefit to a religious sect" and to allow the public subsidy of textbooks and bus transportation for nonpublic

		schoolchildren. *Opinion of the Justices*, 109 N.H. 578, 258 A.2d 343 (1969).
N E W MEXICO	"No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state...." Article IV, § 31. "...and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university." Article XII, § 3.	State Attorney General has construed first provision not to apply to Federal funds received by the State, and second provision to permit a voucher system allowing parents of exceptional children to purchase services from a private school. *See*, 1975 Op. Att'y Gen. No. 75-10 and 1976 Op. Att'y Gen. No. 76-6.
NEW YORK	"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." Article XI, § 3.	
NORTH DAKOTA	"No money raised for the support of the public schools of	

	the state shall be appropriated to or used for the support of any sectarian school." Article VIII, § 5.	
OHIO	"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." Article VI, § 2.	State Supreme Court has construed this provision not to prohibit programs that provide indirect benefits to sectarian schools and has upheld the public subsidy of the bus transportation of parochial schoolchildren *See Protestant and Other Americans United v. Essex*, 28 O.S.2d 79, 275 N.E. 2d 603 (1971) and *Honohan v. Holt*, 46 O.S.2d 79, 244 N.E.2d 537 (1968).
OKLAHOMA	No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such." Article 2, § 5.	State Supreme Court has construed this provision to prohibit the transportation of parochial schoolchildren on public school buses, and State Attorney General has construed it to prohibit administration of Federal conservation grants and certain Federal education grants which were to be allocated in part to private sectarian schools but to allow a local education agency to administer Chapter I grants that required inclusion of private schoolchildren in remedial education programs. *See*, *Gurney v. Ferguson*, 190 Okl. 254, 122 P.2d 1002 (1942), *appeal dism'd*, 317 U.S. 588 (1943); Op.Atty.Gen. No. 79-132 (May 7, 1979); Op.Atty.Gen. No. 82-68 (March 10, 1982); and Op.Atty.Gen. No. 82-169 (June 7, 1982).

OREGON	"No money shall be drawn from the Treasury for the benefit of any religeous (*sic*), or theological institution...." Article I, § 5.	
PENN-SYLVANIA	"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." Article 3, § 15. "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made...in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning...." Article 3, § 29.	These provisions have been construed to allow the public subsidy of bus transportation of, and loan of secular textbooks to, sectarian schoolchildren. *See Springfield School District, Delaware County v. Department of Education*, 483 Pa. 539, 397 A.2d 1154 (1979), *appeal dism'd*, 443 U.S. 901 (1980) and *Meek v. Pittenger*, 374 F.Supp. 639 (E.D. Pa. 1974), *aff'd in part, rev'd in part on other grounds*, 421 U.S. 349 (1975).
SOUTH CAROLINA	"No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution." Article XI, § 4.	State Supreme Court has held this provision to be violated by a program of tuition grants for students attending private sectarian colleges in the State. *Hartness v. Patterson*, 255 S.C. 503, 179 S.E.2d 907 (1971).
SOUTH DAKOTA	"...No money or property of the state shall be given or appropriated for the benefit of sectarian or religious society or institution." Article VI, § 3. "No appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by	State Supreme Court has construed these provisions to be more restrictive than First Amendment and to prohibit the loan of secular textbooks to sectarian schoolchildren and the payment of tuition at a sectarian college, and State Attorney General has opined that the provisions bar as well

	the state, or any county or municipality within the state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift or bequest of lands, money or other property to be used for sectarian purposes...." Article VIII, § 16.	bus transportation for students attending sectarian schools. *See Elbe v. Yankton Independent School District*, 372 N.W.2d 113 (S.D. 1985); *Synod of Dakota v. State*, 2 S.D. 366, 50 N.W. 632 (1891); Attorney General Report 1931-32, p. 261; and Attorney General Report 1951-52, P. 45.
TEXAS	"No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." Article 1, § 7. "...Except as provided by this section, no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof ever be appropriated to or used for the support of any sectarian school...." Article 7, § 5.	State Attorney General has construed these provisions to prohibit the transportation of parochial schoolchildren on public school buses and the use of a vocational rehabilitation grant to pay tuition at a sectarian school. *See* Op.Atty.Gen. 1941, No. 0-4220; Op.Atty.Gen. 1946, No. 0-7128; and Op.Atty.Gen. 1940, No. 0-2412.
UTAH	"...No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment...." Article I, § 4. "Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization." Article XI, § 9.	

VIRGINIA

"The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall be the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth." Article IV, § 16.

"No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate, or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second....; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also

These provisions have been judicially construed to be more restrictive than the First Amendment and to forbid tuition payments to sectarian elementary and secondary schools, but to allow the payment of tuition and the incidental expenses of a handicapped student attending an out-of-state religious college on the grounds the benefit was to the student and not to the State. *See, Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955) and *Phan v. Commonwealth of Virginia*, 806 F.2d 516 (4th Cir. 1986).

	to any school or institution of learning owned or exclusively controlled by such county, city, town or school district." Article VIII, § 10. "The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education." Article VIII, § 11.	
WASHINGTON	"...No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment...." Article 1, § 11. "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Article 9, § 4.	State Supreme Court has construed these provisions to be more restrictive than the First Amendment and to prohibit the bus transportation of students attending sectarian schools, the payment of tuition to needy students attending public and nonpublic elementary and secondary schools, and the use of a vocational rehabilitation grant by a blind student to obtain training in a religious vocation from a religious college. *See*, *Visser v. Nooksack Valley School District*, 33 Wash.2d 699, 207 P.2d 198 (1949); *Weiss v. Bruno*, 82 Wash.2d 199, 509 P.2d 973 (1973); and *Witters v. State Commission for the Blind*, 112 Wash.2d 363, 771 P.2d 1119, *cert. den.*, 110 S.Ct. 147 (1989).
WISCONSIN	"...[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or	State Supreme Court has construed first provision not to bar all aid programs "merely because there is some

theological seminaries." Article 1, § 18.

"Nothing in the constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning." Article 1, § 23.

shadow of incidental benefit to a church-related institution," and State Attorney General has opined that it applies as well to Federal assistance received by the State, that it prohibits the provision of educational services on the premises of church-related schools, and that it allows the subsidy of school lunch programs at church-related schools. *See*, *State ex rel. Warren v. Nusbaum*, 64 Wis.2d 314, 219 N.W.2d 577 (1974); Op.Atty.Gen., Feb. 23, 1978; Op.Atty.Gen., Oct. 4, 1974; and Op.Atty.Gen., May 1, 1980.

WYOMING

"No money of the state shall ever be given or appropriated to any sectarian or religious society or institution." Article 1, § 19.

"No appropriation shall be made for charitable, industrial, educational, or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." Article 3, § 36.

David M. Ackerman
Legislative Attorney
American Law Division